

IN THE UNITED STATES DISTRICT COURT
for the District of Columbia

SIERRA CLUB,
85 Second Street, 2nd Floor, San Francisco,
CA 94105,

STOP I-3 COALITION, INC. a.k.a.
WAYSSOUTH,
1074 Arbor Drive, Lakemont, GA 30552,

WESTERN NORTH CAROLINA
ALLIANCE,
29 N. Market Street, Suite 610
Asheville, NC 28801,

THE WILDERNESS SOCIETY,
1615 M Street NW, Washington, DC 20036,

Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION,

Defendant.

No.

COMPLAINT
FOR DECLARATORY
AND INJUNCTIVE RELIEF

Complaint for Declaratory and Injunctive Relief

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive relief compelling the Federal Highway Administration (“FHWA”) to waive fees for access to public records related to a contentious highway project and to produce those records promptly. Plaintiffs, nonprofit organizations, seek the records in furtherance of their missions to advocate for the natural environment and to educate the public about Corridor K, an expensive and unnecessary highway project that would traverse important National Forest lands and degrade the environment in the mountains of East Tennessee and Western North Carolina.

2. Plaintiffs requested records relating to FHWA's oversight and funding of Corridor K in North Carolina and Tennessee. After conversations with FHWA staff, Plaintiffs further limited their request to recent records in the official "project files" maintained by FHWA for two specific sections of Corridor K and digital files in the possession of a handful of FHWA employees most involved in the project.
3. Plaintiffs asserted their statutory right to a waiver of search and duplication fees for their requests, as noncommercial entities seeking to educate the public about controversial government activities. FHWA nonetheless denied Plaintiffs' fee waiver, and Plaintiffs filed an administrative appeal. Ultimately, nearly eight months after its appeal decision was due, FHWA denied the appeal.
4. Plaintiffs submitted two follow-up requests (1) seeking statutory waiver of "search fees" triggered by the agency's failure to meet FOIA's deadlines and (2) asking for a narrow subset of the records sought in the initial request. Both follow-up requests were met with denial or obstruction, and a subsequent administrative appeal was again met with delay.
5. Because of the extensive search and other fees demanded by FHWA for access to these public records and FHWA's long delays, Plaintiffs have not yet obtained access to the requested records, now more than 18 months after submitting their Freedom of Information Act request.
6. Plaintiffs seek an injunction from this Court ordering a full waiver of fees associated with their FOIA request, prompt production of responsive records, and other relief.

Jurisdiction and Venue

7. This Court has jurisdiction over this action and the parties under 5 U.S.C. § 552(a)(4)(B).
8. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

9. Defendant FHWA is an agency within the Department of Transportation, a Department of the Executive Branch of the United States Government. FHWA has substantial authority to oversee state departments of transportation (“state DOTs”) in the design, construction, and maintenance of the United States’ highway system. FHWA is an “agency” within the meaning of 5 U.S.C. § 552(f).
10. Plaintiff Sierra Club is a national organization that works to protect communities and wild places.
11. Plaintiff Waysouth is a nonprofit organization that works to preserve and protect the unique heritage and environment of the Southern Appalachians by promoting sustainable transportation practices. Waysouth maintains a webpage to disseminate information about Corridor K and circulates newsletters and press releases about the project.
12. Plaintiff Western North Carolina Alliance is a nonprofit grassroots organization working to facilitate effective public involvement to meet local and regional environmental threats.
13. Plaintiff The Wilderness Society is a national nonprofit organization with an office in Western North Carolina working to protect public lands.
14. Pursuant to their missions, Plaintiffs each monitor transportation projects that adversely impact the natural environment and disseminate information to their many members as well as the general public to inform public debate about such projects.
15. Plaintiffs’ members frequently recreate and otherwise enjoy the publicly-owned lands of East Tennessee and Western North Carolina that would be affected by the construction of the sections of Corridor K about which they are seeking public records. Plaintiffs’

members' use and enjoyment of these public lands would be adversely affected if these sections of Corridor K are approved by FHWA and constructed as currently proposed.

16. Plaintiffs each were parties to the FOIA requests at issue in this litigation and have exhausted all administrative remedies and appeal rights afforded by FHWA.

The Appalachian Development Highway System and Corridor K

17. In 1965, and again in subsequent legislation, Congress authorized the expenditure of federal funds for highways on the Appalachian Development Highway System ("ADHS"). 40 U.S.C. § 14501. Defendant FHWA oversees the use of federal funds for constructing and maintaining the nation's highways, including the ADHS.
18. Corridor K is a designated corridor of the ADHS, with termini at Interstate Highway 75 near Cleveland, Tennessee, and Highway 23/441 near Dillsboro, North Carolina.
19. Proposed improvements to Corridor K have been largely completed except for two discrete sections—one in East Tennessee and another in Western North Carolina. FHWA is involved with active projects to complete each of these sections.
20. The remaining, unimproved sections of Corridor K cross rugged mountain terrain and will be among the most expensive segments.
21. These remaining segments would cut new roadways through the Cherokee and Nantahala National Forests and cross the Appalachian Trail, impacting significant recreational and environmental resources.
22. Plans to construct each of these segments have been considered and tabled in the past, due to fiscal and environmental concerns, prior to initiation of planning for the current proposals.

23. The current proposals for these two segments have been controversial, engendering interagency disagreement and public comment and debate by diverse parties, including Plaintiffs, in a variety of fora, including formal public comments, agency-facilitated public meetings, local and state newspapers, and the internet.

FHWA's Involvement in the Development of Transportation Projects

24. FHWA is responsible for ensuring that Federal-aid highways, including the North Carolina and Tennessee Corridor K projects, comply with applicable safety, design, and construction standards as required to remain eligible for federal funding. See 23 C.F.R. § 652.3.
25. FHWA is responsible for ensuring that these projects comply with Section 4(f) of the Transportation Act of 1966, 23 U.S.C. § 138; 49 U.S.C. § 303. In that role, FHWA must evaluate these projects in light of their impacts to public parks, recreation areas, wildlife and waterfowl refuges, and historic sites, their costs, and their other environmental impacts.
26. FHWA is tasked with ensuring that these projects comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332. In that role, FHWA shares responsibility for the preparation of the Environmental Impact Statements required by NEPA for each of the currently proposed Corridor K projects. 23 U.S.C. § 139(c).
27. FHWA is responsible for both intermediate and final approvals of these projects. Both the North Carolina Department of Transportation ("NCDOT") and the Tennessee Department of Transportation ("TDOT") must obtain FHWA approval for decisions including the project's purpose and need, range of alternatives, methodologies of analysis, selection of preferred alternatives, and mitigation commitments. FHWA must

adopt the final EIS documents prepared by NCDOT and TDOT as its own before issuing final approvals and authorizing federal funding for the projects.

28. NCDOT and TDOT, along with FHWA and “participating” state and federal agencies, have entered into interagency agreements to streamline permitting requirements and project reviews. Pursuant to these agreements, “lead” agencies (the state DOTs and FHWA) prepare environmental analyses for review and “concurrence” by state and federal permitting agencies. If a participating agency declines to “concur” in the lead agencies’ analysis at any of several agreed upon “concurrence points,” the process halts until the controversy is resolved.
29. State and federal agencies participating in both the North Carolina and Tennessee Corridor K projects have refused to concur in the Corridor K projects as currently designed. Both NCDOT and TDOT have eliminated alternative designs for their projects that would reduce cost and environmental harm, arguing that such alternatives would not meet minimum federal design standards and funding requirements. Nonconcurring agencies in both Tennessee and North Carolina have expressed doubts as to whether the Corridor K projects as currently designed by NCDOT and TDOT are justified by transportation needs and whether alternative designs are available that would be consistent with applicable federal standards and funding requirements.
30. FHWA has participated in the interagency issue resolution process for both states, as it is required to do under each state’s streamlining agreement. A facilitator’s report prepared at FHWA’s request cited “confusion” about the minimum design standards necessary to secure federal funding as a key stumbling block for the North Carolina project.

31. The forward progress of each state's project has been slowed by the nonconcurrence of permitting agencies. As a fortunate result, the records sought by Plaintiffs remain relevant to the public debate. Were it not for this delay, however, the process might well have advanced until many of the records would no longer be useful.
32. The legal obligations and project background stated in paragraphs 16 through 31 were known to FHWA at the time FHWA denied Plaintiffs' fee waiver.

FOIA and its Fee-Waiver Provision

33. FOIA "is the most prominent expression of a profound national commitment to ensuring an open government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike." President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies ("2009 Executive Memorandum"). 74 Fed. Reg. 4683 (Jan. 21, 2009).
34. Upon receipt of a request that reasonably describes the records sought, a federal agency must conduct a search reasonably calculated to uncover all relevant documents and must make non-exempt responsive records "promptly available." 5 U.S.C. § 552(a)(3)(A).
35. Under FOIA's fee-waiver provision, federal agencies "shall ... furnish[]" requested records "without any charge or at a charge reduced below the fees established . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).
36. FOIA's fee waiver provision is intended to facilitate a more informed debate over the wisdom of government actions. A fee waiver for noncommercial requesters is appropriate if some of the requested records relating to a matter of public interest have

not yet been disseminated to the public and the requesters have the intent and capacity to disseminate those records.

37. FOIA's fee waiver provision was drafted with special solicitude for certain types of requesters, including public interest organizations like Plaintiffs. Accordingly, FOIA's fee waiver provision is liberally construed in favor of waivers for noncommercial requesters.

Plaintiffs' FOIA Request and Fee-Waiver Request

38. By letter dated September 16, 2011, Plaintiffs filed a request under FOIA for records relating to Corridor K (attached as Exhibit A). Plaintiff's request encompassed documents not already in the public domain, such as email and correspondence between FHWA and the state DOTs or other agencies and officials.
39. In their September 16, 2011 request, Plaintiffs asserted their right to a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii), documenting their intent to review and disseminate the requested information to the public via their websites, publications, interviews with media, and public meetings, and explaining that disclosure of the requested records was likely to aid public understanding of FHWA's activities with respect to the Corridor K projects. Plaintiffs also pointed out that they are all nonprofit organizations working to protect the natural resources of the Southeast and that the request was not made in furtherance of a commercial interest.
40. Plaintiffs asked FHWA to "[p]lease let us know whether you need additional information to evaluate this fee-waiver request."
41. FHWA did not seek any additional information from Plaintiffs in order to evaluate their request for a fee waiver.

FHWA's Initial Denial of Plaintiffs' Fee-Waiver Request

42. By letters dated October 17, 2011 (attached as Exhibits B and C), the Tennessee and North Carolina Divisions of FHWA denied Plaintiffs' request for a fee waiver, citing identical reasons.
43. In the letters denying Plaintiffs' request for a fee waiver, FHWA explained its view that Plaintiffs had not provided enough information regarding which government activities Plaintiffs are interested in, how the public's understanding will be enhanced, how Plaintiffs will use the records to educate the public, whether Plaintiffs have the "expertise" to convey the information to the public, and whether the request is in Plaintiffs' commercial interest.
44. In the letters denying Plaintiffs' request for a fee waiver, FHWA stated that it would not begin processing Plaintiffs' request until Plaintiffs committed to pay search, review, and copy costs. Those costs were estimated at \$630 for records maintained by the Tennessee Division of FHWA and, for records maintained by the North Carolina Division, search costs of "at least" \$9,400 to \$15,400 plus copy costs for a file "approximately four (4) linear feet in size."

Plaintiffs' Agreement to Narrow their Request for Records

45. Explaining the high cost estimate, the North Carolina Division of FHWA stated that Plaintiffs' request would require a search for records "spanning a time period of over four (4) decades, from approximately 15 individuals who are located in multiple FHWA offices."

46. On October 27 and 28, 2011, Plaintiffs' counsel participated in phone conversations with FHWA staff from the North Carolina and Tennessee Divisions, which were memorialized by FHWA in letters dated November 10 and 16, 2011 (attached as Exhibits D and E).
47. During the October 27, 2011 phone conversation with the North Carolina Division of FHWA, Plaintiffs' counsel clarified that Plaintiffs' request is focused on the uncompleted segments of Corridor K in North Carolina known as segments A, B, and C. FHWA staff explained that key project records were already compiled in a central hardcopy "project file" and a shared directory for digital files. FHWA suggested that Plaintiffs limit their request for email and digital files of individual employees to the last five years, which would reduce the number of employees whose files would need to be searched. FHWA also identified several key employees who have been most involved with the North Carolina Corridor K project.
48. During the October 28, 2011 phone conversation with the Tennessee Division of FHWA, FHWA staff informed Plaintiffs' counsel that the records related to the current project were already compiled in a central "project file" and that all such records were dated on or after September 21, 2010 (the date that a Notice of Intent was published in the Federal Register). FHWA also identified several key employees who have been most involved with the Tennessee Corridor K project.
49. Based on these conversations about FHWA's file management protocols, Plaintiffs agreed to substantially narrow the scope of their request. As narrowed, Plaintiffs' request sought only the following:
- a. For records maintained by the Tennessee Division of FHWA,

- i. Hardcopy and electronic records related to Corridor K dating from the current project's Notice of Intent in the Federal Register on September 21, 2010;
 - ii. Emails and electronic documents in the possession of five key staff members identified by FHWA; and
 - b. For records maintained by the North Carolina Division of FHWA,
 - i. All records in FHWA's "project file" related to the uncompleted segments of the Corridor K; and
 - ii. Emails and electronic documents related to Corridor K retained by four key staff members identified by FHWA and dating from the last five years to the present.
50. Plaintiffs have since learned that FHWA's assurances regarding the dates of records relating to the current Tennessee project may have been inaccurate. Subsequent to their conversations with FHWA staff, Plaintiffs obtained documents from the Tennessee Department of Transportation which, under FHWA's records retention policies, should also be located in FHWA's files, and which are dated much earlier than September 21, 2010, including:
- a. A letter from TDOT to the Tennessee Division of FHWA formally announcing TDOT's intent to begin environmental studies for the current project, dated December 29, 2008; and
 - b. A contract signed by the Tennessee Division of FHWA approving funding for environmental studies for the current project, dated November 14, 2008.

51. The conversations of October 27 and 28, 2011, later memorialized by FHWA, formally narrowed Plaintiffs' September 16, 2011 request. All of FHWA's subsequent communications and decisions relate to Plaintiffs' narrowed request, not the request as originally articulated in Plaintiffs' September 16, 2011 letter.

Plaintiffs' Appeal of FHWA's Fee Waiver Denial

52. Despite Plaintiffs' agreement to narrow their request, FHWA concluded in letters dated November 10 and 16, 2011, that the narrowed scope was "not likely to appreciably reduce the work associated with responding to your FOIA request" and that the estimate of costs remained "valid."

53. By letter dated November 16, 2011, Plaintiffs timely submitted an administrative appeal of FHWA's denial of their request for a fee waiver (attached as Exhibit F).

54. In support of their appeal, Plaintiffs provided additional information and supporting documentation in response to concerns cited by FHWA's initial denial, including documentation of each Plaintiff's non-profit status, an explanation of Plaintiffs' non-economic interests in Corridor K, and information about Plaintiffs' ability to review, understand, synthesize, and disseminate responsive records to inform public debate.

55. In further support of their appeal, Plaintiffs explained the purpose for their request and the likely public benefit, pointing out that while some information about Corridor K is already in the public domain, most of the requested records are not. Plaintiffs explained at length that the public has a strong interest in understanding federal agency involvement with this controversial project and receiving the information necessary to participate meaningfully when there are opportunities for public comment and debate.

FHWA Delay in Processing Plaintiffs' Appeal

56. FHWA received Plaintiffs' appeal on November 22, 2011.
57. Pursuant to 5 U.S.C. § 552(a)(6) and 49 C.F.R. § 7.32(a), an appeal decision was due on December 21, 2011.
58. After the appeal deadline passed, Plaintiffs' counsel telephoned FHWA staff on several occasions to monitor the progress of the appeal.
59. Plaintiffs offered to pay the costs associated with responding to the request so that FHWA could begin producing responsive records, on condition that Plaintiffs could still pursue their appeal and receive reimbursement if the appeal was granted. FHWA declined that offer.
60. By telephone conversation with Plaintiffs' counsel in January, 2012, FHWA staff (Ron Gagnon) acknowledged that Plaintiffs' appeal was a relatively simple matter.
61. Mr. Gagnon also informed Plaintiffs' counsel that fee waiver denials from some FHWA Divisions are more frequently reversed on appeal than other Divisions.
62. On January 19, 2012, FHWA staff (Brian Bullock) informed Plaintiffs' counsel that five fee waiver appeals had been received ahead of Plaintiffs' appeal and, while FHWA "hoped" to answer Plaintiffs' appeal within a matter of "weeks," it would more likely take "a couple of months."
63. Nearly three months later, on April 10, 2012, when Plaintiffs' counsel again contacted FHWA to ascertain whether any progress had been made, FHWA staff (Ron Gagnon) told Plaintiffs' counsel that there were not five, but eight appeals ahead of Plaintiffs' appeal.
64. FHWA indicated its backlog was specific to its office in Washington, D.C., where all FOIA appeals are processed. Accordingly, Plaintiffs offered to re-submit their request as

a new request to the Tennessee and North Carolina Divisions of FHWA, with whatever additional supporting information FHWA required, and withdraw the appeal if the re-submitted request was granted. Plaintiffs followed up by making the same offer to FHWA attorney Scott Jones. FHWA declined that offer.

65. On June 8, 2012, after Plaintiffs again contacted FHWA to find out whether any progress had been made, FHWA informed Plaintiffs' counsel by email that it had implemented a "multi-tracking" process that would move Plaintiffs' appeal ahead of other, more complicated matters.

66. Seven weeks later, on July 27, 2012, Plaintiffs had still not received an answer to their appeal. At that time, Plaintiffs' counsel informed FHWA by email that Plaintiffs would file suit if no answer was forthcoming within ten business days.

67. On August 10, 2012, ten business days after Plaintiffs notified FHWA of their intent to file suit and nearly eight months after a final decision regarding Plaintiffs' request for a fee waiver was due, FHWA sent Plaintiffs' counsel its final decision by electronic mail.

Final Agency Decision

68. FHWA's final decision (attached as Exhibit G) denied Plaintiffs' fee waiver in connection with their September 16, 2011 request, as narrowed by location, date custodian, and subject by the conversations of October 27 and 28, 2011.

69. In considering Plaintiffs' appeal, FHWA stated that it considered the statutory standard for fee waivers in 5 U.S.C. § 552(a)(4)(A)(iii) and a six-factor test set out in FHWA regulations at 49 C.F.R. § 7.44(f).

70. FHWA's appeal decision did not address the first factor in its six-factor test, (whether the request is related to federal government activity), which the agency's initial determination had decided in Plaintiffs' favor.
71. FHWA's appeal decision reversed the agency's initial determination that Plaintiffs did not qualify for a fee waiver under the third factor. Specifically, FHWA found that the disclosure will contribute to the understanding of the public at large.
72. FHWA's appeal decision also reversed the agency's initial determination that Plaintiffs did not qualify for a fee waiver under the fifth and sixth factors, which assess whether the requester has a commercial interest and whether that interest outweighs the public interest. Specifically, FHWA found that Plaintiffs' request did not serve any commercial interests.
73. FHWA's appeal decision cited only two of the six factors as weighing against a fee waiver:
- a. FHWA asserted that disclosure of the requested records would not likely contribute to an understanding of government operations or activities, concluding that Plaintiffs' request was too broad to show a connection to any government activity of "genuine public concern."
 - b. FHWA further asserted that disclosure would not contribute significantly to public understanding because "there is extensive information about the Corridor already available to the public" on the Appalachian Regional Commission's website and in public hearings and informational meetings. FHWA stated that public understanding could not be enhanced by disclosing the non-public records

because Plaintiffs “d[id] not identify, with any particularity any possible wrongdoing, or improper decisions by the agency.”

74. Plaintiffs have exhausted their administrative remedies, and FHWA’s denial of Plaintiffs’ fee waiver is subject to judicial review and reversal.

Plaintiffs’ Request for Updated Fee Estimate

75. On October 29, 2012, after FHWA issued its final denial of Plaintiffs’ fee waiver, Plaintiffs requested an updated estimate of costs associated with their request for records (attached as Exhibit H).

76. In support of their request for a reduced cost estimate, Plaintiffs noted that FHWA’s original estimate, which included “search” costs, “review” costs, and “copy” costs, was no longer valid for several reasons, including:

- a. Plaintiffs could not be required to pay “review” costs because FHWA had abandoned its position that Plaintiffs were “commercial” requesters, see 49 C.F.R. § 7.44(d); and
- b. Plaintiffs could not be required to pay “search” fees because, absent exceptional circumstances, an agency which fails to comply with the 20-day deadline for responding to a fee waiver appeal cannot charge “search” costs to a noncommercial requester, see 5 U.S.C. § 552(a)(4)(A)(viii).

77. In letters replying to Plaintiffs’ request for an updated estimate of costs (attached as Exhibits I and J), FHWA acknowledged that Plaintiffs are noncommercial requesters and conceded that FHWA could not charge “review” fees. FHWA nonetheless concluded that Plaintiffs’ request to waive “search” fees had already been addressed by FHWA’s final decision denying a fee waiver (Exhibit G).

78. In the final fee waiver decision (Exhibit G), FHWA did not directly address the search-fee waiver provision of 5 U.S.C. § 552(a)(4)(A)(viii), but did attempt to justify the delay, citing an “unprecedented backlog” in FOIA appeals, with “several cases” ahead of Plaintiffs appeal. FHWA also noted that during the pendency of Plaintiffs’ appeal, FHWA implemented a “multi-track system allowing FOIA appeals of fee waiver decisions and appeals of no-records decisions to be separated from all other FOIA appeal requests.”
79. In reply to Plaintiffs’ request for an updated estimate of costs, FHWA informed Plaintiffs of its view that its “unprecedented backlog” constitutes “exceptional circumstances” under 5 U.S.C. § 552(a)(4)(A)(viii), a decision which, according to FHWA, “remains final.” Accordingly, FHWA’s decision not to waive search fees is subject to judicial review.

Plaintiffs’ New Request for Narrow Subset of Records

80. Also on October 29, 2012, Plaintiffs submitted a new FOIA request, along with a new request for a fee waiver, for a narrow subset of the records sought in Plaintiff’s original September 16, 2011 FOIA request (attached as Exhibit K).
81. Plaintiffs’ new October 29, 2012 FOIA request sought, in addition to FHWA’s records retention policies, records related to two substantive issues:
- a. The design standards applicable to highways of the AHDS in general or Corridor K in particular, other than the AASHTO Green Book and the ARC Code, whether such standards are imposed by FHWA, the Appalachian Regional Commission (“ARC”), or any other source; and

- b. The effects of MAP-21, P.L. 112-141 (July 6, 2012), on past, present, or future funding for highways of the ADHS in general or Corridor K in particular.
82. In Plaintiffs' October 29, 2012 FOIA request, "records" was defined to include "communications, correspondence, records of phone conversations, electronic mail, memoranda, reports, . . . notes, observations, [and] impressions," among other things.
83. By correspondence dated November 29 and 30, 2012 (attached as Exhibits L and M), FHWA timely responded to Plaintiffs' October 29, 2012 request but produced only one document in response to each of the substantive categories: a single policy document relating to design standards for the ADHS and a one-page "fact sheet" summarizing the effects of MAP-21.
84. By letter dated December 27, 2012, Plaintiffs appealed FHWA's response on the ground that FHWA failed to conduct a search reasonably calculated to find all responsive records (attached as Exhibit N).
85. As Plaintiffs argued in their December 27, 2012 administrative appeal, FHWA's role in the Corridor K projects guarantees there are additional responsive records.
86. As Plaintiffs further argued in their December 27, 2012 administrative appeal, FHWA is in possession of a number of responsive records that were not uncovered by its search, some of which Plaintiffs have received from other sources and described in their appeal.
87. FHWA's records retention policies require that relevant records be retained for at least six years and must be maintained in a manner that facilitates quick and accurate retrieval. DOT Orders 1351.28.5.11.1 and 1351.28.5.12.1; FHWA Records Disposition Schedules.
88. FHWA received Plaintiffs' December 2012 appeal on January 2, 2013, and a response was therefore due by January 31, 2013. See 5 U.S.C. § 552(a)(6); 49 C.F.R. § 7.32(a).

89. As of April 4 2013, FHWA still had not responded to Plaintiffs' appeal.
90. Plaintiffs have exhausted their administrative remedies to challenge FHWA's inadequate search for the records listed in their October 29, 2012 request. See 5 U.S.C. § 552(a)(6)(C)(i).

COUNT ONE:

Unlawful Denial of Statutory Fee Waiver

5 U.S.C. § 552(a)(4)(A)(iii) & (a)(4)(B).

91. Plaintiffs herein incorporate by reference paragraphs 1 through 90 of this Complaint.
92. FOIA requires federal agencies to provide records at no charge or a reduced charge whenever disclosure of the requested records would be in the public interest because it would likely contribute significantly to public understanding of federal government activity and is not primarily in the commercial interest of the requester.
93. As FHWA has acknowledged, Plaintiffs are requesters with no commercial interest in the records sought.
94. There is an extensive nexus between Corridor K and federal government activity.
- Corridor K is a contentious project to be funded with federal tax dollars under FHWA's supervision. FHWA's role in these projects requires frequent and close coordination with the state DOTs and periodic review and approval of the projects as they are developed.
95. Plaintiffs have requested records relating to FHWA involvement with Corridor K, limited to the most relevant records by location, date, custodian, and subject matter.
96. As FHWA has acknowledged, Plaintiffs will disseminate the requested records to the public at large, as opposed to a narrow segment of interested persons.

97. The administrative record before the FHWA substantiated Plaintiffs' eligibility for a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii).

98. FHWA denied Plaintiffs' fee waiver on the grounds that disclosure of the requested records is not likely to contribute, nor contribute significantly, to public understanding of a matter of public concern. FHWA's rationales for this conclusion, however, are legally and factually erroneous:

- a. FHWA asserts that it will make "a significant number of independent decisions" for Corridor K, and Plaintiffs did not "specify" which decisions they were interested in. Plaintiffs specified, however, that they were interested in enhancing public understanding of "whether the project is necessary, whether the corridor is located appropriately in light of available alternatives, whether environmental impacts have been adequately considered, how the agency has reacted internally to criticism of the project, and whether parochial or political influences have improperly borne on these decisions."
- b. Relatedly, FHWA concluded that Plaintiffs' request will reach "a large volume of records," and was therefore too broad to be related to a matter of "genuine public concern." To the contrary, Plaintiff's request, particularly as narrowed after consultation with FHWA, relates to genuine public concern over the use of taxpayer funds on a multi-billion dollar road across publicly-owned lands despite the existence of less damaging alternatives that could serve any legitimate purpose for the project at a fraction of the economic cost.
- c. FHWA objected that Plaintiffs intend to disseminate only derivative, editorial, and analytical work, rather than the full set of records produced by FHWA.

According to FHWA, the public will not be the “primary beneficiary” of disclosure if Plaintiffs exercise “discretion” as to which records to disseminate.

The law is clear, however, that the public benefits from publication of derivative work drawn from government source documents.

- d. FHWA argues that some information is already publicly available. FHWA does not dispute, however, that Plaintiffs’ request would reach significantly more records than are already in the public domain. Indeed, Plaintiffs excluded from their request records that are already publicly available, asking only that FHWA identify where those records can be found. Further, to the extent that “public” information was given only to persons who attended various public hearings and meetings, such ephemeral information cannot be considered “publicly available.”
 - e. Finally, FHWA denied Plaintiffs’ fee waiver request because it did not identify agency “wrongdoing” or “improper decisions” with “particularity.” FHWA argues that, without evidence of wrongdoing, the requested records could “only ... demonstrate FHWA’s compliance with various federal laws,” which will not add significantly to public understanding. No such allegations are required to support a statutory fee waiver under FOIA. The public interest in learning that government has behaved properly is just as strong as the interest in learning that it has behaved improperly.
99. FHWA’s reasons for denying Plaintiffs’ request for a fee waiver are legally insufficient, taken individually or together, to support FHWA’s decision.
100. FHWA’s denial of Plaintiff’s request for a fee waiver violated both the letter and the spirit of FOIA. FHWA has used the fee-waiver process as a “roadblock” to frustrate

and delay Plaintiffs' access to records they need to meaningfully engage in the decisions that will determine whether, where, and how Corridor K will be built.

101. FHWA's failure to grant a statutory fee waiver is subject to review and reversal pursuant to 5 U.S.C. § 552(a)(4)(B).

COUNT TWO

Unlawful Imposition of Search Costs

5 U.S.C. § 552(a)(4)(A)(viii) & (a)(4)(B)

102. Plaintiffs herein incorporate by reference paragraphs 1 through 90 of this Complaint.

103. FOIA prohibits the imposition of search costs when an agency fails to respond to a request or appeal within twenty days unless the agency can demonstrate the existence of "exceptional circumstances." 5 U.S.C. § 552(a)(4)(A)(viii).

104. By prohibiting the imposition of search fees, Congress intended to impose consequences on agencies who fail to meet the statute's deadlines.

105. FHWA is not justified in charging search costs to Plaintiffs because FHWA's backlog of FOIA appeals does not constitute an "exceptional circumstance" excusing FHWA's nearly eight-month delay in answering a simple fee waiver appeal.

106. In response to Plaintiffs' request that FHWA recalculate its estimate of fees, FHWA informed Plaintiffs that its decision to impose search fees is a final agency decision, and Plaintiffs therefore have no further obligation to exhaust administrative remedies.

107. FHWA's refusal to produce requested records without first receiving payment of statutorily barred search costs is contrary to law and subject to review and reversal pursuant to 5 U.S.C. § 552(a)(4)(B).

COUNT THREE

Failure to Perform a Search Reasonably Calculated to Uncover Records Responsive to Plaintiffs' October 29, 2012 Request

5 U.S.C. § 552(a)(4)(B)

108. Plaintiffs herein incorporate by reference paragraphs 1 through 90 of this Complaint.
109. Upon receipt of a reasonably specific request, FOIA requires federal agencies to conduct a search reasonably calculated to uncover all relevant records.
110. Plaintiffs requested that FHWA provide records relating to specific aspects of design and funding for Corridor K and other ADHS highways, including communications, correspondence, records of conversations, email, memoranda, reports, notes, observations, and impressions. FHWA did not object that Plaintiffs' request was not reasonably specific.
111. FHWA disclosed only one document responsive to each of the substantive categories of Plaintiffs' request.
112. FHWA's role in coordinating with state DOTs and approving project decisions guarantees that FHWA received or created other records that were not disclosed.
113. Records obtained by Plaintiffs from other sources show that FHWA has additional responsive records in its possession.

114. FHWA's records retention policies require it to keep such records and to maintain them in a manner that facilitates quick and accurate retrieval.

115. Because FHWA has neither produced the responsive records in its possession nor indicated that records have been withheld, FHWA's search cannot have been reasonably calculated to find all records responsive to Plaintiffs' October 29, 2012 request.

116. FHWA's lax response to Plaintiffs' request shows that it is unwilling or unable to comply with its FOIA obligations generally or, alternatively, is using the FOIA process as a means to obstruct Plaintiffs' access to records to which they are lawfully entitled.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request this Court to grant judgment:

- a. With respect to Plaintiffs' September 16, 2011 request,
 - i. Enjoining FHWA to grant a full waiver of all fees associated with Plaintiffs' September 16, 2011 request; and
 - ii. Enjoining FHWA to promptly produce records responsive to Plaintiffs' September 16, 2011 request, including all records related to the current project in Tennessee (whether dated on or before September 21, 2010), under a timeline supervised by this Court; or, in the alternative,
 - iii. Declaring that FHWA's delay in answering Plaintiffs' appeal was not justified by exceptional circumstances and enjoining FHWA from assessing search fees associated with Plaintiffs' September 2011 request; and

- b. With respect to Plaintiffs' October 29, 2012 request, enjoining FHWA to promptly conduct an adequate search for the records described in Plaintiffs' request;
- c. Awarding Plaintiffs their reasonable attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);
- d. Retaining jurisdiction over this matter until FHWA fully complies with this Court's order; and
- e. Granting any other relief the Court deems just and proper.

Respectfully Submitted,

April 5, 2013

/s/ Austin D. Gerken Jr.
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